(1) Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

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DAVID F. GRACIANO,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING

Respondent

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# PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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## QUESTION PRESENTED FOR REVIEW

Does a rule excluding expert testimony because it is based on facts shown circumstantially rather than directly offend the due process clause?

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## OPINIONS BELOW

The only appellate opinion rendered in this case was that of the Commonwealth Court of Pennsylvania. It was an unpublished memorandum opinion.

## STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered November 8, 1999.

## CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment, which provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

## STATEMENT OF THE CASE

The within petition seeks review of the decision of the Commonwealth Court of Pennsylvania, entered February 17, 1999, reversing the January 13, 1998 order of the Court of Common Pleas of Allegheny County, Statutory Appeals Division, (Watson, J.), sustaining petitioner's appeal from a decision of a Pennsylvania Department of Transportation decision suspending his operator's license on the basis of his alleged refusal to take a breathalyzer test.[1] The Supreme Court of Pennsylvania denied allowance of appeal on November 8, 1999.

On March 22, 1997, petitioner was observed throwing pills out of his car window at a sobriety checkpoint. H.T. 4-5.[2] Police retrieved the pills, pulled petitioner over, smelled alcohol on his breath, and observed other indicia of intoxication. He completed a breath test, which registered a blood alcohol level of .065. H.T. 9-10, 46. The pills were Vicodin, an opiate. H.T. 9. Because of them, petitioner was

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[1] Pennsylvania's Implied Consent Law, found at 75 Pa. C. S. §1547(b)(1) of the Motor Vehicle Code, provides as follows:

> If any person placed under arrest for a violation of section 3731 (relating to driving under influence of alcohol or controlled substance) is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person for a period of 12 months.

[2] The designation "H.T." refers to the hearing transcript.

requested to submit to a blood test, and refused.

Petitioner presented the testimony of Richard Asarian, a clinical psychologist. Dr. Asarian testified that, based on his review of petitioner's medical records, petitioner had suffered from major depression since April of 1994 and continued to suffer from it. He had been under the care of various psychiatrists and three different medications had been prescribed for him: Prozac, Effexor, and Zoloft. Petitioner had been placed on Zoloft on February 24, 1997. H.T. 23-24. Dr. Asarian testified:

> [T]his indicates a history of chronic depression; and, also, a history of trying different drugs, none of which have had a whole lot of success so far. [H.T. 24.]

He was asked whether it was effective; he responded:

> I think it was ineffective, enough to have negative effects; and it was under non-stressful situations reducing the depression to some degree; but it was not curing the depression.
>
> The other indicator of that was the physician increasing it from 15 milligrams twice a day; which, I think, he was under, at the time of the incident, which was 100 milligrams.
>
> After that, he tried to increase it to 200 which is the maximum that you are allowed to prescribe to somebody. [H.T. 27-28.]

He was then questioned as follows:

> Q. So, at the time of this incident, he was under

the maximum dosage.

A. No. He was under 100.

Q. Under 100 at the time of the incident. Is that enough —

A. And, then, afterwards, the doctor assessed that that was not working and increased it even more; and, then, it was eventually discontinued.

Q. After this incident — he was at 100 milligrams at the time of the incident. After the incident —

A. It went up to 200.

Q. — went up to 200. The doctor made the assessment that it wasn't working, didn't work, so he discontinued it.

A. Yes. [H.T. 28-29.]

Dr. Asarian described the side effects of Zoloft as follows:

> Insomnia is one of them. Confusion is one of them. In his case, memory loss was a major one[.] [H.T. 33.]

He was asked whether it was his professional opinion that petitioner could not, to a reasonable degree of medical certainty, make a knowing, conscious refusal, and responded in the affirmative. H.T. 39. He repeatedly testified that the

low dosage of alcohol had not played any role in the impairment. H.T. 48, 50, 52. He noted that petitioner had no history of alcoholism. H.T. 51. The following question was asked:

> Q. It is your opinion, whether he took the alcohol at .065 or whether he didn't take the alcohol, would the depression and the stress and the Zoloft have made him unable to make a knowing, conscious refusal?
>
> A. Yes. [H.T. 50.]

He also testified that it would not have been possible for petitioner to foresee the effects of the medication or to communicate the fact that he was on Zoloft to the police. H.T. 63-64.

The trial court found this testimony credible and found that petitioner had not knowingly and consciously refused the test, and sustained petitioner's appeal.

PennDOT appealed to the Commonwealth Court of Pennsylvania, challenging the competency of Dr. Asarian's testimony and questioning whether he had expressed the requisite degree of medical certainty. The latter issue was held to be waived by virtue of PennDOT's failure to include it in its Statement of the Questions Involved. The Commonwealth Court agreed with PennDOT on the competency issue, and reversed the trial court and reinstated the suspension. Its order was entered on February 17, 1999.

A Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on November 8, 1999.

## REASONS FOR GRANTING THE WRIT

In *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), in which the issue was the constitutionality of Mississippi's exclusion of reliable hearsay, Your Honorable Court stated:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. [*Id.* at 294, 93 S. Ct. at 1045, 35 L. Ed. 2d at 308.]

Your Honorable Court went on to hold that Mississippi's rigid application of the hearsay rule violated the Due Process Clause.

Petitioner respectfully submits that the application of a similarly rigid evidentiary standard deprived him of the fair opportunity to defend himself in a penal proceeding.[3]

It is true that an expert opinion must be based on facts in evidence. However, those facts need not be testified to directly; they may be shown circumstantially. Petitioner's use of Zoloft on the night in question was circumstantially shown

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[3] Pennsylvania recognizes that proceedings for the revocation of a professional license are penal in nature: *Pennsylvania Real Estate Commission v. Keller*, 401 Pa. 454, 165 A. 2d 79 (1960); *Leach v. Pennsylvania Real Estate Commission*, 25 Pa. Cmwlth. 474, 360 A. 2d 269 (1976). There is no reason why the revocation of a driver's license should be considered any less penal.

by his medical records, on which the expert was entitled to rely.

Granted, there was no direct and specific testimony that petitioner had Zoloft in his system on the night in question. However, such testimony was not required. Petitioner's medical records, which the witness reviewed, showed that he had been prescribed Zoloft for depression. In fact, they showed that the psychiatrists treating him had made several attempts to alleviate his condition with various medications. There is nothing in the record to suggest that petitioner had any history of going off medication against medical advice, and PennDOT had ample opportunity to cross-examine the witness on this issue.

Petitioner respectfully submits that when it is shown that a person was prescribed medication, it is a permissible inference that the person took the medication. An expert may rely on inferences from evidence as well as direct evidence: *Bolus v. United Penn Bank*, 525 A. 2d 1215 (Super. 1987). And, as the Superior Court put it in *Vernon v. Stash*, 532 A. 2d 441 (Super. 1987):

> The facts assumed by an expert need not be conclusively proven; it is sufficient if the evidence of record tends to establish those assumptions. [*Id.* at 449; citations omitted.]

*See also Commonwealth v. Schneider*, 562 A. 2d 868 (Super. 1989). In that case, the Superior Court stated:

> [W]hile expert testimony normally must be supported by evidence of record, the [Pennsylvania] Supreme Court has carved out a narrow exception to this general rule....This exception allows "medical witnesses to express opinion testimony on medical matters based, in part, upon reports of

> others which are not in evidence, but which the expert customarily relies upon in the practice of his profession." [*Id.* at 874; citation omitted.]

*Accord*: *Satler v. Department of Transportation*, 670 A. 2d 1205 (Cmwlth. 1996); *Robinson v. Jackson*, 602 A. 2d 917 (Cmwlth 1992).

The medical records described in this case were clearly of the type on which a psychologist would rely in the practice of his profession, and sufficed to make Dr. Asarian's opinion competent.

The Commonwealth Court stated:

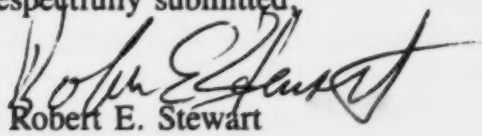
> We must conclude that there is a difference between a medical expert's testimony regarding diagnosis or related matters based on medical records not in evidence, and expert testimony that assumes behavior on the part of the patient because of a physician's prescription of medicine. The fact that medicine was prescribed does not prove that medicine was ingested. [Opinion at 6, 7a *infra*.]

The "difference" referred to above goes to the weight to be accorded the testimony, not to its competency. The fact that medicine was prescribed is not conclusive proof that it was ingested, but it is still a fact permitting the inference of ingestion. The trial court legitimately drew that inference. The Commonwealth Court infringed upon the prerogative of the trial court to decide what credibility and weight to assign to a particular witness' testimony; such infringement should be disapproved by Your Honorable Court.

In *Chambers*, *supra* Your Honorable Court stated "[T]he hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302, 93 S. Ct. at 1049, 35 L. Ed. 2d at 313. This case presents Your Honorable Court

with the opportunity to apply the same principle to quasi-penal proceedings and to the equally rigid evidentiary rule invoked in this case. Certiorari is accordingly appropriate.

Respectfully submitted,



Robert E. Stewart
Attorney for Petitioner

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

DAVID F. GRACIANO

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,

Appellant

No. 474 C.D. 1998

ORDER

AND NOW, this 17th day of February, 1999, the order of the Court of Common Pleas of Allegheny County in the above-captioned matter is hereby reversed, and the one-year suspension of the driving privileges of David F. Graciano imposed by the Department of Transportation, Bureau of Driver Licensing, is hereby reinstated.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

DAVID F. GRACIANO

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,

Appellant

No. 474 C.D. 1998

Submitted: December 18, 1998

BEFORE:
HONORABLE JAMES GARDNER COLINS,
President Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE CHARLES P. MIRARCHI, JR.,
Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE MIRARCHI

FILED: February 17, 1999

The Department of Transportation, Bureau of Driver Licensing (Department) appeals the order of the Court of Common Pleas of Allegheny County (trial court) sustaining

the appeal of David F. Graciano from the suspension of his operators license. We reverse.

By notice dated May 2, 1997, the Department notified Graciano that his operating license would be suspended for one year because of his refusal to submit to chemical testing on March 22, 1997. Graciano appealed, and a hearing de novo was held before the trial court on October 23, 1997. The Department presented the testimony of police officers James Miles and Glenn Aldridge. Graciano presented the testimony of Dr. Richard Asarian, a clinical psychologist. Graciano did not testify.

Officer Miles testified that on March 22, 1997, Graciano was observed throwing some pills out of his car window while he waited in a line of cars at a sobriety checkpoint. The observer was a tow-truck operator and police officer who collected the pills and notified officers at the checkpoint. Officer Miles then pulled Graciano over and, as he spoke with Graciano, detected the odor of alcohol on Graciano's breath, together with glassy and red eyes and an aspect of confusion in his deportment. Graciano failed several field sobriety tests. He was then asked to submit to a Breathalyzer test and agreed to do so. Graciano provided two breath samples that registered a blood alcohol reading of .065. Officer Miles then asked that he submit to a blood test because of the poor results of the field sobriety tests and the presence of pills.[1] Graciano agreed. In fact, he even asked Officer Miles, repeatedly, if he could have a blood test after he had taken the Breathalyzer test. Notes of Testimony (N.T.), pp. 10, 13. Graciano was placed under arrest and transported to the hospital. At the hospital, Officer Aldridge read to Graciano the implied consent warnings. Graciano asked Officer Miles whether he should take the test or not and

[1] The pills were identified as Vicodin, a controlled substance.

ultimately decided not to take the test.

Dr. Asarian testified that he had recently seen Graciano twice as a patient and had reviewed his medical records. Based upon this information, Dr. Asarian determined that Graciano suffered from major depression since April 1994 and continued to suffer from it. Graciano had been under the care of various psychiatrists, and three different medications had been prescribed for him, the latest being Zoloft which was prescribed in February 1997. Dr. Asarian testified that this indicated a history of chronic depression and a history of attempts to treat with various drugs without indications of success. Dr. Asarian noted that the physician who prescribed Zoloft to Graciano originally prescribed a twice-daily dosage of 15 milligrams, increasing the dosage to 100 milligrams, which was the prescription at the time of the incident, and increasing the dosage yet again to 200 milligrams, the maximum, sometime after the incident. Dr. Asarian described the indicators of depression as: "Being confused; obsessed with negative things; feeling like the world is collapsing around you; inability to concentrate; when he does concentrate, it is mostly thinking over and over again about negative things." N.T., p. 24. Dr. Asarian did not believe that the Zoloft was having a positive effect on Graciano.

Dr. Asarian opined, within a reasonable degree of medical certainty, that Graciano was unable to make a knowing and conscious refusal to the request to submit to the blood test primarily because of his depression and his being overwhelmed by anxiety and fear. He also opined, however, that the effects of the Zoloft and stress and tiredness played a role in Graciano' inability to make a knowing and conscious refusal to take the blood test. He further opined on cross-examination that although he could not say that alcohol played absolutely no role in Graciano's impairment, he did not believe that the amount of alcohol that would have registered

a sample of .065 could contribute to the impairment.[2] He opined that Graciano's depression and the lesser factors of Zoloft, stress, and tiredness would have impaired his ability to make a knowing and conscious refusal, whether he ingested that amount of alcohol or not. Finally, Dr. Asarian opined that Graciano's depression also made it very difficult, if not impossible, for him to communicate to the police about his taking Zoloft.

The trial court sustained Graciano's appeal, finding credible Dr. Asarian's testimony that Graciano was unable to make a knowing and conscious refusal to the request to submit to the blood test because of Graciano's depression and the effects of Zoloft. The Department's appeal to this Court followed. In a driver's license suspension appeal, this Court's scope of review is limited to determining whether the trial court committed an error of law or an abuse of discretion, or whether the trial court's findings of fact are supported by substantial evidence. *Commonwealth v. Danforth*, 530 Pa. 327, 608 A.2d 1044 (1992).

Additionally, this Court is bound to review the evidence in the light most favorable to the party that prevailed before the trial court. *Department of Transportation, Bureau of Driver Licensing v. Malizio*, 618 A.2d 1091 (Pa. Cmwlth. 1992).

The Department argues that the trial court erred by sustaining Graciano's appeal on the testimony of Dr. Asarian. The Department contends that Dr. Asarian's testimony is incompetent because it assumes a fact not in evidence. The Department argues that no factual foundation was laid to support Dr. Asarian's assumption that Graciano had ingested

[2] Dr. Asarian repeatedly testified that he did not believe that alcohol played any role in Graciano's impairment. N.T., pp. 48, 50, and 52.

Zoloft. Thus, the Department argues, the trial court's reliance upon Dr. Asarian's testimony that the Zoloft contributed to Graciano's impairment was erroneous. The Department also argues that Dr. Asarian could not absolutely eliminate the consumption of alcohol as a factor in Graciano's refusal. For these reasons, the Department contends that the trial court erred by sustaining Graciano's appeal.

We first note that the Department only set forth one argument in its Statement of Questions Involved, that of whether the trial court erred by relying upon Dr. Asarian's testimony when that testimony assumed the fact of Zoloft ingestion that was allegedly not in evidence. Rule 2116(a) of the Pennsylvania Rules of Appellate Procedure provides that "ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby." Therefore, the Department's tack-on argument -- that the trial court erred in sustaining Graciano's appeal when Dr. Asarian allegedly could not completely rule out that alcohol had an effect upon Graciano's incapacity to make a knowing and conscious refusal -- is considered waived. *Braxton v. Department of Transportation*, 634 A.2d 1150 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 539 Pa. 682, 652 A.2d 1326 (1994); *Appeal of Gemstar/Ski Brothers*, 574 A.2d 1201 (Pa. Cmwlth. 1990).

We conclude, however, that the Department's properly preserved argument has merit. As a general rule, an expert witness's opinion must be based upon facts established by the evidence. *Fernandez v. City of Pittsburgh*, 643 A.2d 1176 (Pa. Cmwlth. 1994), petition for allowance of appeal denied, 544 Pa. 637, 675 A.2d 1253 (1996). Graciano did not testify, and no evidence was submitted that showed that Graciano had been ingesting Zoloft at or near the time of the incident. We do note Graciano's argument that "[i]t is a generally accepted principle of law that physicians may render an opinion based on review of [medical] records." *Satler v. Department of*

*Transportation, Bureau of Driver Licensing*, 670 A.2d 1205, 1207 (Pa. Cmwlth. 1996).[3] Dr. Asarian's testimony, however, failed to indicate anything more than that Zoloft was prescribed to Graciano and that this prescription was adjusted. Dr. Asarian was not the prescribing physician and he failed to testify that he had any reason, aside from noting a physician's prescription, to believe that Graciano had been taking Zoloft or, if he was, in what quantities and for what duration. We must conclude that there is a difference between a medical expert's testimony regarding diagnosis or related matters based on medical records not in evidence, and expert testimony that assumes behavior on the part of the patient because of a physician's prescription of medicine. The fact that medicine was prescribed does not prove the fact that medicine was ingested.

The Department argues that *Gombar v. Department of Transportation, Bureau of Driver Licensing*, 678 A.2d 843 (Pa. Cmwlth. 1996), petition for allowance of appeal denied, 549 Pa. 705, 700 A.2d 443 (1997), is dispositive of the issue. In *Gombar*, a motorist with a history of psychiatric treatment stemming from an automobile accident refused to submit to a chemical test after losing control of her vehicle on an icy road. An odor of alcohol was detected on her breath, and she refused to submit to field-testing. Gombar's medical expert testified that Gombar's posttraumatic stress disorder and her flashback to the earlier accident rendered her incapable of making a knowing and conscious refusal. The only evidence

[3] In Satler, we held that letters from a physician, based on the physician's review of a report and interview notes made by a nurse, were admissible and competent evidence sustaining the Department's recall of an operator's license because of incompetency even though the physician never examined, interviewed, or observed the operator.

of alcohol consumption was Gombar's testimony that she consumed one glass of wine before the incident. The trial court found that Gombar failed to prove that alcohol had no role in her inability to make a knowing and conscious refusal based upon the answer to a hypothetical question posed to her expert. That question asked the expert to assume that Gombar was intoxicated at the time. The expert, under that hypothetical, could not rule out the effect of over-consumption of alcohol upon Gombar's ability to make a knowing and conscious refusal. We agreed that the trial court committed reversible error by relying upon this testimony as it assumed a fact not in evidence, Gombar's intoxication. We noted that the only evidence of alcohol consumption was the testimony that Gombar had consumed one glass of wine prior to the incident.

Although Gombar is not entirely on parallel with the case before us, it does illustrate that it is error for an expert to base testimony upon an assumption not found in evidence. In *Gombar*, critical testimony was based upon a baseless assumption of intoxication rather than the evidence of the consumption of one glass of wine. Here, Dr. Asarian's testimony regarding the effects of Zoloft was based upon the doctor's assumption that Graciano had followed his physician's instructions when the only evidence of record was that Graciano had received these instructions.

In a driver's license suspension case, the Department has the burden to establish that an operator arrested for driving under the influence had refused to submit to a chemical test after being asked to take one and after being warned of the consequences for refusal.[4] *Department of Transportation, Bureau of Driver Licensing v. Boucher*, 547

[4] There is no dispute that the Department met its burden in this case.

Pa. 440, 691 A.2d 450 (1997). The burden then shifts to the operator to prove that his or her refusal was not knowing or conscious or that he or she was physically incapable of making a knowing and conscious refusal. *Id.* When the medical cause is not obvious, an operator must prove that he or she was incapable of making a knowing and conscious refusal through competent and unequivocal medical testimony. *Jacobs v. Department of Transportation, Bureau of Driver Licensing*, 695 A.2d 956 (Pa. Cmwlth.), petition for allowance of appeal denied, 549 Pa. 705, 700 A.2d 443 (1997). Here, Graciano presented the testimony of Dr. Asarian, who testified that Graciano could not make a knowing and conscious refusal because of Graciano's depression and to a lesser extent because of the effects of Zoloft and stress. Because there is no evidence of record that Graciano actually ingested Zoloft at any time at or near the time of the incident, the testimony regarding the effects of Zoloft is rendered incompetent. The trial court found that Graciano was not able to make a knowing and conscious refusal because of his depression and the effects of the Zoloft. That finding is not fully supported by the record.

Accordingly, the order of the trial court is reversed, and the suspension of Graciano's operating privileges is reinstated.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

STATUTORY APPEALS DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

DAVID F. GRACIANO

SA# 453 OF 1997

ORDER

AND NOW, 13th day of January, 1998, the above appeal having come on for hearing, upon consideration thereof, it is hereby ordered that the appeal of the defendant is hereby sustained.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

STATUTORY APPEALS DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

DAVID F. GRACIANO

SA# 453 OF 1997

OPINION BY WATSON, J.

David F. Graciano, ("Defendant"), was arrested March 22, 1997 after being stopped at a sobriety checkpoint conducted by City of Pittsburgh police at the 1500 block of East Ohio Street, Pittsburgh, PA. His operators license was suspended by Pa. Department of Transportation for allegedly refusing to submit to chemical testing at the request of the officer. This appeal followed.

Defendant's counsel argues that Defendant's refusal was not knowing and conscious and at hearing called Dr. Richard Asarian, a clinical psychologist, in support of that position. Dr. Asarian testified at length concerning Defendant's condition and concluded that Defendant's major depression combined with Zoloft, the medication prescribed for Defendant, prohibited him from making a knowing conscious refusal to submit to the requested test. His opinion was based on a reasonable degree of medical certainty. (T. 39). We accepted that testimony as credible and found as a fact that Defendant did not knowingly, consciously refuse the proffered test.

Therefore, we sustained Mr. Graciano's appeal.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DAVID F. GRACIANO,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,

Respondent

No. 204 W.D. Alloc. Dkt. 1999

ORDER

PER CURIAM

AND NOW, this 8th day of November 1999, the Petition for Allowance of Appeal is denied.